

FILED

1 JEREMIAH J. DONOVAN AC 2091

2 MAULE CREEK STATE PRISON

3 P.O. Box 409090

4 LONG, CA. 95640

5 IN PROPRIA PERSONA

APR 11 2022

CLERK, U.S. DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

DEPUTY CLERK

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8 UNITED STATES DISTRICT COURT
9 EASTERN DISTRICT OF CALIFORNIA
10
11

12 JEREMIAH J. DONOVAN,
13 PETITIONER,
14

15 v.
16


17 KATHLEEN ALLISON, SECRETARY,
18 CALIFORNIA DEPARTMENT OF CORRECTIONS
19 AND REHABILITATION,
20 RESPONDENT.
21

CASE NO. 1:20-CV-00694-ADA-EPG

PETITIONER'S OPPOSITION TO
RESPONDENT'S MOTION TO
DISMISS.

22
23 PETITIONER, JEREMIAH J. DONOVAN, RESPECTFULLY
24 SUBMITS THE FOLLOWING OPPOSITION TO RESPONDENT'S
25 MOTION TO DISMISS PETITIONER'S SECOND AMENDED
26 PETITION FOR WRIT OF HABEAS CORPUS AS UNTIMELY.
27

28 DATED: April 4th, 2022

RESPECTFULLY SUBMITTED


JEREMIAH J. DONOVAN, PETITIONER

Page Number

MEMORANDUM OF POINTS AND AUTHORITIES
IN SUPPORT OF PETITIONER'S OPPOSITION
TO RESPONDENT'S MOTION TO DISMISS.

PETITIONER, JEREMIAH S. DONOVAN, WILL AND HEREBY
JOHNSON V. AVERY, 793 US 484 (1969), RESPECTFULLY
SUBMITS THE FOLLOWING POINTS AND AUTHORITIES IN
SUPPORT OF HIS OPPOSITION TO RESPONDENT'S
MOTION TO DISMISS PETITIONER'S SECOND AMENDED
PETITION FOR WRIT OF HABEAS CORPUS AS UNTIMELY.
PETITIONER HEREBY ALLEGES, CONTENTS, AND ARGUES
BY THIS VERIFIED PLEADING AS FOLLOWS.

I
INTRODUCTION

1. PETITIONER, PURSUANT TO DYE V. HOFMAYER,
546 U.S. 1, 4 (2005), INCORPORATES ALL THE
DOCUMENTS FILED, AND LODGED, IN THE ABOVE-
ENTITLED MATTER, BY REFERENCE AS DULY SET
FORTH HEREIN.

2. PETITIONER ALLEGES, CONTENTS, AND ARGUES THAT
"THE VERY ESSENCE OF CIVIL LIBERTY CERTAINLY
CONSISTS IN THE RIGHT OF EVERY INDIVIDUAL TO CLAIM
THE PROTECTION OF THE LAWS, WHEREVER HE RECEIVES
AN INJURY." (MARSHALL V. MADISON, 5 US 137, 163 (1803)).
ACCORD ART. I, §9, CL. 2, UNITED STATES CONSTITUTION.

3. PETITIONER TAKES EXCEPTION TO RESPONDENT'S

"DECLINE OF JURISDICTION OF UNITED STATES MAGISTRATE JUDGE," DATED 7/22/22, ON THE GROUND THAT RESPONDENT WAIVED OR FORFEITED THAT OPTION BY WAITING ALMOST TWO YEARS TO MAKE THE REQUEST, AND RESPONDENT HAS NOT OBJECTED TO THE JURISDICTION OF THE MAGISTRATE JUDGE DECIDING ANY PREVIOUS MATTERS UNDER 28 USC § 636 (b)(1)(C). (ECF NO. 2, 7, 9, 10, 11, 13, 18, 20.)

4. IN ADDITION, PETITIONER ALLEGES, CONTENTS, AND ARGUES THAT RESPONDENT WAIVED OR FORFEITED THE STATUTE OF LIMITATIONS DEFENSE BY NOT FILING ANY OBJECTIONS TO PETITIONER'S MOTION FOR STAY AND AFRAYANCE PROCEDURE ALMOST TWO YEARS AGO. (ECF NO. 2, 9, 10, 11, 13; AND SEE PETITIONER'S "STATUS REPORTS," 1 TO 4.)

5. IN ADDITION, PETITIONER ALLEGES, CONTENTS, AND ARGUES THAT RESPONDENT'S MOTION TO DISMISS SHOULD BE REJECTED. (SEE UNITED STATES V. KOJAYAN, 8 F.3D 1315 (9th CIR. 1993) ("THE PROSECUTOR'S JOB ISN'T JUST TO WIN, BUT TO WIN FAIRLY, STAYING WELL WITHIN THE RULES"), ACCORD BERGER V. UNITED STATES, 295 U.S. 78 (1935).) BECAUSE THE IMPEDIMENT UNDER 28 USC § 2244(d) (1)(A), CREATED BY RESPONDENT HAS NOT BEEN REMOVED. (SEE ECF NO. 19 AT "GROUND SIX" AT 29-32.)

6. IN OTHER WORDS, THE IMPEDIMENT CREATED BY RESPONDENT CONTINUES BY SUPPRESSING THE EXCULPATORY EVIDENCE FROM THE DNA TEST RESULTS OF THE EVIDENCE COLLECTED BY POLICE. (BRADY V. MARYLAND,

377 U.S. 83 (1963) (HOLDING THAT PROSECUTORS HAVE A CONSTITUTIONAL DUTY TO TURN OVER EVIDENCE THAT MIGHT SHOW DEFENDANT IS INNOCENT); KYLES V. WHITLEY, 514 U.S. 419, 437, 438 (1995) ("THE INDIVIDUAL PROSECUTOR HAS A DUTY TO LEARN OF ANY FAVORABLE EVIDENCE KNOWN TO THE OTHERS ACTING ON THE GOVERNMENT'S BEHALF IN THE CASE, INCLUDING THE POLICE."); SEE IMBLER V. PACHTMAN, 424 U.S. 409, 427, N. 25 (1976) ("AFTER A CONVICTION THE PROSECUTOR ALSO IS BOUND BY THE ETHICS OF HIS OFFICE TO INFORM THE APPROPRIATE AUTHORITY OF AFTER-ACQUIRED OR OTHER INFORMATION THAT CASTS DOUBT UPON THE CORRECTNESS OF THE CONVICTION."); IN RE LAWLEY (2008) 42 CM-4M 1231, 1246 (SAME); PEOPLE V. GARCIA (1993) 17 CM-APP. 4M 1169, 1179 (REQUIRING, AS A MATTER OF ETHICS, DISCLOSURE DURING MATRONS CORPUS PROCEEDINGS);

7. FURTHERMORE, PETITIONER ALLEGES, CONTENTS, AND AVERGES THAT RESPONDENT'S MOTION TO DISMISS PETITIONER'S SECOND AMENDED PETITION FOR WRIT OF MATRONS CORPUS (SAP) AS UNTIMELY (MOTION TO DISMISS ("MOTION")), SHOULD BE DENIED FOR THE FOLLOWING REASONS.

II

SUMMARY OF BACKGROUND

8. ON SEPTEMBER 5, 2014 PETITIONER WAS CONVICTED BY A JURY OF ASSAULT WITH A DEADLY

1 WEAPON, A HEAVY DUTY MAG FLASHLIGHT. (SEE LOD.
2 DOC. 1, 2 AT P. 3.)

3 9. ON MARCH 21, 2017, AFTER THE CALIFORNIA
4 SUPREME COURT DENIED REVIEW, PETITIONER"
5 JUDGMENT BECAME FINAL 90 DAYS AFTER THE
6 EXPIRATION FOR FILING A PETITION FOR WRIT OF
7 HABEAS CORPUS WITH THE UNITED STATES SUPREME
8 COURT. (LOD. DOCS. 3-4; 28 USC § 2244(d)(1)(A).)

9 10. PETITIONER" DEADLINE FOR FILING A FEDERAL
10 HABEAS PETITION EXPIRED ON MARCH 21, 2018. (28 USC
11 § 2244(d)(1)(A).)

12 11. FROM AUGUST 30, 2017 AND UNTIL DECEMBER 22,
13 2021 PETITIONER SOUGHT REVIEW OF THE JUDGMENT, AND
14 CLAIMS OF HIS CONSTITUTIONAL RIGHTS BEING VIOLATED, PURSUANT
15 TO WHICH HE IS ILLEGALLY AND UNLAWFULLY INCARCERATED,
16 IN THE CALIFORNIA COURTS. (SEE ECF NO. 19 AT 16-26; SEE
17 ALSO LOD. DOCS. 5, 6, 7, 8, 9, 10, 11, 12, 13, 14.)

18 12. ON MAY 14, 2020 PETITIONER CONSTRUCTIVELY FILED
19 HIS INITIAL FEDERAL PETITION FOR WRIT OF HABEAS CORPUS,
20 THAT WAS ASSIGNED CASE NO. 1:20-CV-00694-EPG-HC.
21 (ECF NO. 1.)

22 13. IN ADDITION, PETITIONER REQUESTED A STAY AND
23 APPEAL PROCEDURE PURSUANT TO RHINES V. WEPER, 544
24 U.S. 269 (2005) TO EXHAUST STATE COURT REMEDIES ON
25 THE UNEXHAUSTED CLAIMS LISTED IN HIS MOTION. (ECF NO.
26 2 AT 11-13.)

27 14. ON JUNE 15, 2020 THE MAGISTRATE JUDGE MADE
28 FINDINGS AND RECOMMENDATION TO GRANT PETITIONER"

5

Page Number

1 MOTION TO STAY AND TO GRANT PETITIONER LEAVE TO AMEND
2 HIS INITIAL PETITION FOR HABEAS CORPUS. (ECF NO. 9.)

3 15. IN ADDITION, THE MAGISTRATE JUDGE ISSUED AN ORDER
4 DIRECTING THE CLERK OF THE COURT TO ASSIGN A DISTRICT
5 COURT JUDGE. (Ibid.)

6 16. THE HONORABLE DALE A. DROZD WAS ASSIGNED
7 AS THE DISTRICT JUDGE TO DECIDE THE MERITS OF
8 PETITIONER'S CLAIMS. (SEE ECF NO. 9.)

9 17. ON JUNE 29, 2020 PETITIONER SUBMITTED HIS
10 OBJECTIONS TO THE MAGISTRATE JUDGE'S FINDINGS AND
11 RECOMMENDATION. (ECF NO. 10.)

12 18. IN ADDITION, PETITIONER LOANED HIS FIRST AMENDED
13 PETITION FOR WRIT OF HABEAS CORPUS THAT LISTED THE
14 CONSTITUTIONAL CLAIMS THAT HAD BEEN, AND HAD NOT
15 BEEN, EXHAUSTED TO THE CALIFORNIA SUPREME COURT.
16 (ECF NO. 11.) ("MIXED PETITION")

17 19. ON MARCH 4, 2021 THE DISTRICT COURT JUDGE
18 ADOPTED THE MAGISTRATE JUDGE'S FINDINGS AND
19 RECOMMENDATIONS TO GRANT PETITIONER'S MOTION FOR
20 STAY AND ABSENCE PROCEDURE PURSUANT TO *RHINES*
21 *V. WEBER*, SUPRA, 544 US 269. (ECF NO. 13.)

22 20. IN ADDITION, BASED UPON THE DISTRICT COURT
23 JUDGE'S ORDER, PETITIONER HAS FILED (4) FOUR "STATUS
24 REPORTS" WITH THE DISTRICT COURT, AND RESPONDENT, THAT
25 EXPLAINED HOW PETITIONER WAS EXERCISING "DUE
26 DILIGENCE" FROM AUGUST 30, 2017 AND UNTIL
27 DECEMBER 22, 2021, SEEKING REVIEW OF THE JUDGMENT,
28 AND CLAIMS OF HIS CONSTITUTIONAL RIGHTS BEING

1 VIOLATED, BASED UPON THE "NEWLY DISCOVERED EVIDENCE"
 2 FROM THE DNA TEST RESULTS SHOWING PETITIONER IS
 3 "ACTUALLY INNOCENT" OF ASSAULT WITH A DEADLY
 4 WEAPON, IN THE CALIFORNIA COURTS. (SEE "STATUS
 5 REPORT" 1 TO 4; SEE ALSO ECF NO. 19 AT 16-26; LOC.
 6 DOCS. 5, 6, 7, 8, 9, 10, 11, 12, 13, 14.)

7 21. ON JANUARY 21, 2022 PETITIONER CONSTRUCTIVELY
 8 FILED HIS SECOND AMENDED PETITION FOR WRIT OF HABEAS
 9 CORPUS ("SAP"), WITHIN 90 DAYS OF THE CALIFORNIA
 10 SUPREME COURT DENYING HIS STATE HABEAS PETITION
 11 WITHOUT CITING ANY "PROCEDURAL BARS TO FEDERAL
 12 REVIEW, ON DECEMBER 22, 2021." (ECF NO. 18, 19; LOC
 13 DOC. 14.)

14 III

15 RESPONDENT ARBITRARILY AND ERRONEOUSLY CLAIMED
 16 THAT PETITIONER DID NOT FILE A STATE POST CONVICTION
 17 APPLICATION WITHIN THE LIMITATIONS PERIOD, AND THAT
 18 PETITIONER IS NOT ENTITLED TO STATUTORY AND/OR
 19

20
 21
 22 FOOTNOTE 1: IN PETITIONER'S PETITION FOR REVIEW, FILED WITH
 23 THE CALIFORNIA SUPREME COURT ON AUGUST 19, 2021, PETITIONER
 24 SOUGHT LEAVE OF THE COURT TO PRESENT AND INCORPORATE HIS
 25 HABEAS CLAIMS AS A "PREDICATE TO INTELLIGENT RESOLUTION" OF THE
 26 QUESTION(S) PRESENTED AND ARE "FAIRLY ENCLOSED WITHIN" THE
 27 QUESTION(S) PRESENTED. (LOC. DOC. 11 AT PP. 5, 14 FN. 1; LOC. DOC. 13.)
 28 PETITIONER'S STATE HABEAS WAS FILED WITH THE CALIFORNIA SUPREME
 COURT ON SEPTEMBER 13, 2021, BEFORE REVIEW WAS DENIED.
 (LOC. DOCS. 13, 12.)

EQUITABLE TOLLING OF THE LIMITATIONS PERIOD.

A.

22. RESPONDENT ARGUED THAT PETITIONER'S SAP SHOULD BE DISMISSED AS UNTIMELY BECAUSE PETITIONER FILED HIS SAP ON JANUARY 21, 2022, OVER (3) THREE YEARS AFTER EXPIRATION OF THE AEDPA'S 1-YEAR LIMITATIONS PERIOD ON MARCH 21, 2018. (MOTION AT 3-5.)

23. IN ADDITION, RESPONDENT ARGUED THAT PETITIONER IS NOT ENTITLED TO STATUTORY TOLLING, AND/OR EQUITABLE TOLLING, BECAUSE PETITIONER DID NOT FILE ANY STATE COLLATERAL ACTIONS WITHIN THE LIMITATIONS PERIOD. (Id. AT 3-5, 4-5.)

24. IN ADDITION, RESPONDENT ARGUED THAT PETITIONER IS NOT ENTITLED TO A LATER TRIGGER DATE OF THE LIMITATIONS PERIOD UNDER 28 USC § 2244(d)(1)(D). (MOTION AT 4.)

25. FURTHERMORE, RESPONDENT ARGUED THAT A HABEAS PETITION IS NOT A VEHICLE FOR PETITIONER TO SEARCH FOR EVIDENCE FROM DNA TEST RESULTS TO SUPPORT HIS CLAIMS OF HIS CONSTITUTIONAL RIGHTS BEING VIOLATED. (Id. AT 4-5.)

26. PETITIONER TAKES EXCEPTION TO THE SUFFICIENCY OF RESPONDENT'S ARGUMENTS ON THE GROUND THAT THEY ARE "CONTRARY TO" CLEARLY ESTABLISHED FEDERAL LAW AS DETERMINED BY THE UNITED STATES SUPREME COURT.

27. IN ADDITION, PETITIONER DENIES AND DISPUTES

EACH AND EVERY ALLEGATION AND/OR ARGUMENT MADE BY RESPONDENT AS BEING ARBITRARY, UNREASONABLE, AND CLEARLY ERRONEOUS.

.B.

28. "THE TIME DURING WHICH A PROPERLY FILED APPLICATION FOR STATE POST-CONVICTION OR OTHER COLLATERAL REVIEW WITH RESPECT TO THE PERTINENT JUDGMENT OR CLAIM IS PENDING SHALL NOT BE COUNTED TOWARD ANY PERIOD OF LIMITATION." (28 U.S.C. § 2244(d)(2).)

29. THE CORRECT INTERPRETATION OF 28 USC § 2244(d)(2) IS THAT WORD "STATE" APPLIES TO "POST-CONVICTION OR OTHER COLLATERAL REVIEW" ONLY IN STATE COURTS, NOT FEDERAL COURTS, TOLLS THE LIMITATIONS PERIOD. (ARTUZ V. BENNETT, 531 US 4 (2000); DUNCAN V. WALKER, 533 US 167 (2001); TILLEMAN V. LONG, 253 F3d 494 (9th Cir. 2001).)

30. PETITIONER HAS NO FEDERAL SUBSTANTIVE DUE PROCESS RIGHT TO OBTAIN DNA TESTING. (SKINNER V. SWITZER, 562 US 521, 524-525 (2011).)

31. HOWEVER, PETITIONER HAS A PROCEDURAL DUE PROCESS RIGHT TO A VIABLE MECHANISM FOR OBTAINING SUCH TESTING. (Id.; SEE UNITED STATES V. DEWASTON, 792 F2d 1174, 1181-82 (9th Cir. 2015) (FEDERAL DNA ACT, 18 USC § 3600, ALSO ALLOWS FOR DNA TESTING).)

32. AS DESCRIBED IN GROUND FOURTEEN OF

1 Petitioner' SAP (ECF NO. 19, "GROUND FOURTEEN" AT
 2 121-140). PETITIONER RELIED UPON MORRISON V.
 3 PETERSON, 809 F.2d 1059, 1064-65 (9th Cir. 2015), TO
 4 ARGUED TO THE CALIFORNIA SUPREME COURT CLEARLY
 5 ESTABLISHED FEDERAL LAW AS DETERMINED BY THE
 6 UNITED STATES SUPREME COURT TO SHOW THAT
 7 PETITIONER'S DUE PROCESS RIGHTS UNDER DIST. ATT.
 8 FOR THIRD JUDICIAL DIST. V. OSBORNE, 557 US 52, 68
 9 (2009); AND/OR SCHUP V. DELO, 513 US 298, 324, 327
 10 (1995); HOUSE V. BELL, 547 US 518, 536-537, 540-541
 11 (2006), WERE VIOLATED BY THE TRIAL COURT ARBITRARILY
 12 DENYING PETITIONER'S MOTIONS FOR DNA TESTING AND
 13 REQUEST FOR COUNSEL. (LWD. DOC. 11 AT 5-31, 2-3.)

14 33. IN ADDITION, PETITIONER ARGUED TO THE
 15 CALIFORNIA SUPREME COURT THAT A STATE POST-CONVICTION
 16 DISCOVERY PROCEDURES WILL BE UPSET "ONLY IF THEY ARE
 17 FUNDAMENTALLY INADEQUATE TO VINDICATE THE SUBSTANTIVE
 18 RIGHTS PROVIDED." (IDA AT P. 25, CITING MORRISON V.
 19 PETERSON, SUPRA, 809 F.2d AT 1064-65 (QUOTING OSBORNE,
 20

21
 22 FOOTNOTE 2: PETITIONER DID INFORM THE CALIFORNIA
 23 SUPREME COURT THAT THE TRIAL JUDGE WAS BIASED AND
 24 DENIED PETITIONER'S MOTIONS FOR DNA TESTING AND HAD
 25 PETITION TO COVER UP THE TRIAL JUDGE VIOLATING
 26 PETITIONER'S CONSTITUTIONAL RIGHTS THAT RESULTED IN
 27 THE WRONGFUL CONVICTION OF AN INNOCENT MAN. (ECF NO.
 28 19, "GROUND TEN", "GROUND TWELVE", "GROUND THIRTEEN", SEE
 ALSO LWD. DOC. 11 AT P. 5; LWD. DOC. 13, "GROUNDS EIGHT, TEN, & "A").

1 SUPRA, 557 US AT 69.)

2 34. FURTHERMORE, PETITIONER EXHAUSTED STATE
3 COURT REMEDIES ON HIS "ACTUAL INNOCENT" CLAIM,
4 AS WELL AS HIS OTHER CONSTITUTIONAL CLAIMS ENTITLING
5 PETITIONER TO HABEAS CORPUS RELIEF THE DISTRICT
6 COURT JUDGE DEEMS JUST AND PROPER. (LOA DOC.
7 11, AT 13, 15-16, 29, 24-30; LOA DOC. 13, 14; ECF NO. 9.)
8

9 C.

10 35. PETITIONER ALLEGES, CONTENTS, AND ARGUES
11 PURSUANT TO WAII V. KHOLI, 562 US 545, (2011),
12 THAT HIS MOTIONS FOR DNA TESTING AND FOR APPOINTMENT
13 OF COUNSEL UNDER CALIFORNIA PENAL CODE § 1405, SOUGHT
14 REVIEW OF THE PERTINENT JUDGMENT, AND CLAIMS OF
15 HIS CONSTITUTIONAL RIGHTS BEING VIOLATED RESULTING
16 IN THE WRONGFUL CONVICTION OF AN INNOCENT MAN,
17 FROM AUGUST 30, 2017 AND UNTIL DECEMBER 22,
18 2021 WHILE EXERCISING "DUE DILIGENCE" TO EXHAUST
19 STATE COURT REMEDIES, CONSTITUTES "POST-CONVICTION
20 OR OTHER COLLATERAL REVIEW" UNDER 28 USC § 2254
21 (d)(2). (Id. AT 552, 553, 547, 556 M.Y.; DUNCAN V.
22 WALKER, SUPRA, 544 US AT 172, 175, 176; SEE HUTSON
23 V. QUARTERMAN, 508 F2d 236, 240 (5th CIR. 2007) (PER
24 CURIAM) (MOTION TO TEST DNA EVIDENCE UNDER TEXAS
25 CODE OF CRIMINAL PROCEDURE, ARTICLE 64, CONSTITUTES
26 "OTHER COLLATERAL REVIEW" AND TITUS TOLLS THE AEDPA
27 ONE-YEAR LIMITATIONS PERIOD); CF CAL. PENAL CODE §
28 1509.7 (d) (AN APPLICATION TO THE CALIFORNIA SUPREME

COURT FOR THE SUPERIOR COURT TO CONSIDER A MOTION FOR FILING A SUCCESSIVE MOTION OR UNTIMELY INITIAL MOTION FOR POSTCONVICTION REVIEW UNDER PENN CODE § 1509.7(a) IS NOT AN "APPLICATION FOR STATE POSTCONVICTION OR OTHER COLLATERAL REVIEW WITHIN THE MEANING OF 28 USC § 2244(d)(2)".)

36. THEREFORE, PETITIONER MEEGZ, CONTENTS, AND ARGUES PURSUANT TO DAY V. McDONOUGH, 547 US 198 (2006), PETITIONER IS ENTITLED TO STATUTORY AND EQUITABLE TOLLING OF THE AEDPA ONE-YEAR LIMITATIONS PERIOD FROM AUGUST 30, 2017 AND UNTIL DECEMBER 22, 2021, WHILE PETITIONER EXERCISED "DUE DILIGENCE" SEEKING DNA TESTING OF THE EVIDENCE COLLECTED BY POLICE TO SHOW THAT HE IS "ACTUALLY INNOCENT" OF ASSAULT WITH A DEADLY WEAPON, AND "BUT FOR" THE CONSTITUTIONAL ERRORS (SEE ECF NO. 19), "IT IS MORE LIKELY THAN NOT THAT NO REASONABLE JUROR WOULD HAVE FOUND PETITIONER GUILTY BEYOND A REASONABLE DOUBT." (McQuiggin v. Perkins, 133 S. Ct. 1912, 1933, 1935 (2013) (Quoting Schlup v. Delo, Supra, 513 US at 329, 327); SEE DAY V. McDONOUGH, Supra, 547 US at 201 (THE ONE-YEAR CLOCK IS STOPPED ... DURING THE TIME THE PETITIONER PROPERLY FILED APPLICATION FOR STATE POSTCONVICTION RELIEF IS PENDING); FORD V. MOORE, 296 F.2d 1025, 1040 (11th Cir 2002) (PER CURIAM) (THE FEDERAL HABEAS STATUTORY LIMITATIONS PERIOD IS TOLLED REGARDLESS OF WHETHER A PROPERLY FILED STATE POST-CONVICTION

1 PETITION OR OTHER COLLATERAL REVIEW RAISES A FEDERALLY
2 COGNIZABLE CLAIM); ACCORD TILLEYMAN V. LONG, SUPRA,
3 253 F.2d 494.)

4
5 - D.

6 37. THEREFORE, BASED UPON THE FOREGOING
7 REASONS THE DISTRICT COURT JUDGE SHOULD
8 DENY RESPONDENT'S MOTION TO DISMISS PETITIONER'S
9 SAP AS UNTIMELY. (FED. R. CIV. P., Rule 12 (F), (h).)

10
11 IV

12 RESPONDENT ERRONEOUSLY CLAIMED THAT
13 PETITIONER IS NOT ENTITLED TO A LATER
14 TRIGGER DATE OF THE LIMITATIONS PERIOD
15 UNDER 28 USC § 2244(d)(1)(D).

16
17 - A.

18 38. RESPONDENT ERRONEOUSLY CLAIMED THAT
19 PETITIONER IS NOT ENTITLED TO A LATER TRIGGER DATE
20 OF THE LIMITATIONS PERIOD UNDER 28 USC § 2244(d)(1)
21 (D), BASED UPON THE DNA TEST RESULTS SHOWING PETITIONER
22 IS "ACTUALLY INNOCENT", AS DESCRIBED IN PETITIONER'S
23 SAP. (ECF NO. 19, "GROUND FIVE", "GROUND SIX", AND
24 "GROUND FOURTEEN".)

25
26 - B.

27 39. THE CORRECT INTERPRETATION OF 28 USC §
28 2244(d)(1)(D), ONLY REQUIRES THE HADREAS

1 REITIONER TO EXERCISE "DUE" OR "REASONABLE"
 2 DILIGENCE IN UNCOVERING FACTUAL BASES FOR "ACTUAL
 3 INNOCENCE" CLAIM UNDER SCHUP V. DELO. (SEE
 4 *GUILLOTES V. EVANS*, 622 F.3d 1173 (9th Cir. 2010);
 5 SEE ALSO *LOE V. LAMPERT*, 657 F.3d 929 (9th Cir. 2011).)

6 40. IF THE PETITION ALLEGES NEWLY DISCOVERED
 7 EVIDENCE, THE FILING DEADLINE IS ONE YEAR FROM
 8 "THE DATE ON WHICH THE FACTUAL PREDICATE OF THE
 9 CLAIM OR CLAIMS PRESENTED COULD HAVE BEEN
 10 DISCOVERED THROUGH THE EXERCISE OF DUE
 11 DILIGENCE." (*McQuiggin V. PERKINS*, SUPRA, 133
 12 S.Ct. AT 1929 (QUOTING 28 U.S.C. § 2244(d)(1)(D)).)

13 41. PETITIONER ALLEGES, CONTENTS, AND ARGUES
 14 THAT AEDPA' ONE-YEAR LIMITATIONS PERIOD DOES
 15 NOT START UNTIL RESPONDENT DISCLOSES THE DNA
 16 TEST RESULTS OF THE EVIDENCE COLLECTED BY
 17 POLICE. (*SCARLETT V. SEC'y*, 404 F.3d 394 (11th
 18 CIR. 2010) (LIMITATIONS PERIOD BEGAN DATE OF THE
 19 FIRST DNA REPORT, FROM WHICH FACTUAL PREDICATE
 20 COULD HAVE BEEN DISCOVERED); CF. *CLARK V. OKLAHOMA*,
 21 468 F.3d 711 (10th CIR. 2006) (PETITIONER FAILED TO EXPLAIN
 22 WHY DOCUMENTS HELD BY STATE WERE NECESSARY
 23 TO PURSUE HIS FEDERAL CLAIM, AND HE ALSO DID NOT
 24 SHOW DILIGENT PURSUE OF HIS CLAIMS EVEN AFTER
 25 RECEIVING MATERIALS);)

26
 27 C.

28 42. THEREFORE, BASED UPON THE FOREGOING

IV

Page Number

REASONS THE DISTRICT COURT JUDGE SHOULD DENY
RESPONDENT'S MOTION TO DISMISS PETITIONER'S
SAP AS UNTIMELY. (FED. R. CIV. P., Rule 12(F), (h).)

II.

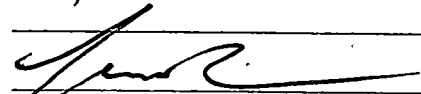
CONCLUSION.

43. THEREFORE, PETITIONER ALLEGES, CONTENTS,
AND ARGUES PURSUANT TO PRACY V. GRAMLEY,
520 US 899, 908-909 (1997), THAT THE DISTRICT
COURT JUDGE SHOULD ORDER RESPONDENT TO COLLECT
THE EVIDENCE FROM THE TULUMING COUNTY SHERIFF
DEPARTMENT (SEE ECF NO. 19 AT PARAGRAPH 406; LOO DOC
II AT PARAS. 12-13; SEE ALSO ECF NO. 19, EXHIBIT D
AT PP. #5, #7, #8; EXHIBIT E AT PP. #1-#2), AND HAVE
THE FBI LABORATORY CONDUCT DNA TESTS ON THE
EVIDENCE, AND DISCLOSE THE DNA TESTS RESULTS
TO THE DISTRICT COURT JUDGE, AND PETITIONER.
(PRACY V. GRAMLEY, SUPRA, 520 US AT 908-909
(GOOD CHANCE IS SHOWN WHERE "SPECIFIC ALLEGATIONS
BEFORE THE COURT SHOW REASON TO BELIEVE THAT THE
PETITIONER MAY, IF THE FACTS ARE FULLY DEVELOPED,
BE ABLE TO DEMONSTRATE THAT HE IS ... ENTITLED
TO RELIEF."); SIMS V. BROWN, 425 F.2d 560, 577 (9TH
CIR. 2005); PHAM V. TERHUNE, 400 F.3d 740, 743 (9TH
CIR. 2005) (A DISTRICT COURT ABUSES ITS DISCRETION IN
NOT ORDERING DISCOVERY WHEN DISCOVERY IS "ESSENTIAL"
FOR THE PLAINTIFF PETITIONER TO "DEVELOP FULLY" HIS

1 underlying claim); *McDaniel v. United States Dist.*
 2 *Court*, 127 F.3d 886, 888 (9th Cir. 1997) (District
 3 Court did not err in ordering discovery
 4 where Petitioner's allegations of ineffective
 5 assistance of counsel were not purely speculative
 6 or unsupported by the record); *See Jones v.*
 7 *Wood*, 114 F.3d 1002, 1004, 1009 (9th Cir. 1997) (Jones
 8 claimed he was actually innocent and trial counsel
 9 failed to have the evidence (bloody clothing) tested
 10 for DNA, and Jones sought an order for
 11 the FBI lab to conduct tests on the clothes
 12 he was wearing the night of the murder).
 13 Thus, the impediment under 28 USC § 2244(d)(1)(B),
 14 as described above in Paragraph 6, would
 15 be removed.³¹

16
17
18 DATE: April 4th, 2022

19
20
21 Respectfully Submitted

22
23 

24 JEREMIAH S. DONOVAN, Petitioner

25
26 FOOTNOTE 3: Pursuant to Fed. R. Civil P., Rule 15(c), Petitioner's
 27 SAP "Relates Back" to May 14, 2020. (*Mayle v. Felix*, 545
 28 644, 664 (2005).)

1 VERIFICATION BY PETITIONER

2
3 I, JEREMIAH J. DONOVAN, DECLARE UNDER THE
4 PENALTY OF PERJURY, 28 USC § 1746, THAT THE FORE-
5 GOING IS TRUE AND CORRECT BASED UPON MY OWN
6 PERSONAL KNOWLEDGE, AND AS TO MATTERS BASED
7 UPON INFORMATION I BELIEVE THOSE MATTERS (CITED
8 AUTHORITIES) TO BE TRUE AND CORRECT.
9

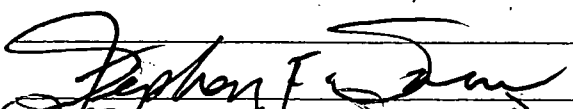
10 EXECUTED ON THE 4TH DAY OF APRIL 2022,
11 AT MULE CREEK STATE PRISON, FONE, CA - 95640.
12

13
14 
15 JEREMIAH J. DONOVAN, DECLARANT.
16

17 VERIFICATION BY JailHouse Lawyer

18
19 I, STEPHEN F. SNOW K20414, DECLARE UNDER
20 THE PENALTY OF PERJURY, 28 USC § 1746, THAT THE
21 FOREGOING IS TRUE AND CORRECT BASED UPON MY OWN
22 PERSONAL KNOWLEDGE FROM READING PETITIONER'S
23 LEGAL PAPERS AND CITED AUTHORITIES.
24

25 EXECUTED ON THE 4TH DAY OF APRIL 2022,
26 AT MULE CREEK STATE PRISON, FONE, CA - 95640.
27

28 
STEPHEN F. SNOW, DECLARANT
JOHNSON V. ALEX, SUPREMA 993 US 483.

PROOF OF SERVICE BY MAIL

STATE OF CALIFORNIA)

)

) SS

DONOVAN v. Allison

County of AMADOR)

CASE NO. 1:20-CV-00694-DAD-EPG

[C.C.C. §§446, 2015.5; 28 U.S.C. §1746]

I, STEPHEN SNOW, K-20414, am a resident of the State of California and am over the age of eighteen years and am not a party to the above action. My address is listed below. Mule Creek State Prison:

PO BOX 409090

IONE, CA 95640

On April 6th, 2022, I served the following documents:

Plaintiff's opposition to Respondent's motion to dismiss.

by placing a true copy thereof enclosed in a sealed envelope with First Class postage thereon fully prepaid in the United States mail by delivering to prison officials for processing through the Institution's internal legal mail system at Ione, California, addressed as follows:

UNITED STATES COURTS
OFFICE OF THE CLERK, UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA
FRESNO, CALIFORNIA 93721-1318

STATE OF CALIFORNIA
OFFICE OF THE ATTORNEY GENERAL
DEPARTMENT OF JUSTICE
P.O. BOX 944255
SACRAMENTO, CA 94244-2550

I declare under penalty of perjury under the laws of the State of California and the United States of America that the foregoing is true and correct. Executed in the County of Amador, California on April 6th, 2022

Stephen F. Snow

Pursuant to the holding of the United States Supreme Court in Houston v Lack 108 S.Ct. 2379, 487 U.S. 266, 101 L.Ed.2d 245 (1988) and FRAP, Rule 4(c) inmate legal documents are deemed filed on the day they are delivered to prison staff for processing and mailing vial the Institution's internal legal mail procedures.